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Supreme Court, U.S.
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In the

SUPREME COURT OF THE UNITED STATES

October Term, 2002

MONEM KABIR, et. al., *Petitioners*

v.

SILICON VALLEY BANK, et. al., *Respondents.*

On Petition for a Writ of Certiorari to the

California Court of Appeal

Sixth Appellate District

PETITION FOR A WRIT OF CERTIORARI

MICHAEL E. ADAMS
LAW OFFICES OF MICHAEL E.ADAMS
605 Middlefield Road
Redwood City, CA 94063
Tel: (650) 364-3346

Counsel for Petitioners

39 pp

QUESTION PRESENTED

The court below upheld the granting of a defense *in limine* motion to exclude evidence critically necessary for proving Petitioners' claims. The question presented is:

> Whether and to what extent the Fourteenth Amendment protects a private civil plaintiff from the *in limine* exclusion of critically necessary evidence due to risks of prejudice, undue time consumption, and/or jury confusion.

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In The

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October Term, 2002

MONEM KABIR, et. al., *Petitioners*

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SILICON VALLEY BANK, et. al., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SIXTH APPELLATE DISTRICT

Petitioners Monem Kabir and Gregory P. Ruebusch respectfully petition for a writ of certiorari to review the judgment issued in this case by the California Court of Appeal, Sixth Appellate District.

Silicon Valley Bank is no longer part of this litigation. The remaining Respondents are Backstrom & Neal, Robert Daney, Mike Spence, and Won Choe.

OPINIONS BELOW

The judgment of the superior court (App., *infra*, pp. A1-A6) and the opinion of the court of appeals (App., *infra*, pp. B1-B18) are unreported.

JURISDICTION

The California Supreme Court entered its order denying review of the opinion of the court of appeals on October 16, 2002 [App., *infra*, C1]. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1257.

STATUTORY PROVISION INVOLVED

California Evidence Code §352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

STATEMENT OF THE CASE

This action was brought by Petitioners Monem Kabir and Gregory P. Ruebusch (collectively "Petitioners"), both former employees of USM Technology, Inc., ("USM") a circuit board manufacturer which is now defunct. The

defendants named in Petitioners' complaint include: (1) Silicon Valley Bank ("SVB") and certain of its officers and employees (collectively "bank defendants"); (2) Backstom & Neal, Robert Daney, and Michael Spence (collectively "accounting defendants"); and (3) Won-Gil Choe ("Choe"). At material times during 1990-92, USM obtained some business loans from the banking defendants, and retained the accounting defendants to review its books.

Petitioners' evidence would prove the following. During July-August, 1991, one of the bank defendants (Robert McMillan, a SVB loan officer) became motivated to conceal from the eyes of visiting state bank examiners certain false loan papers which, unbeknownst to USM, he had fabricated during 1990 in purported documentation of nonexistent loans from SVB to USM. McMillan's new strategy was to shut down USM as a going concern in order to remove the risk that the false loan papers might come to light and imperil his banking career. McMillan pursued this strategy by enlisting the accounting defendants to fabricate information on USM finances which made it appear that USM was financially so weak as to be in default under its loan covenants with SVB, whereas USM was in fact financially viable. This fabricated default enabled SVB to install Choe at USM in February, 1992 to take over its

operations and drive USM into Chapter 7 bankruptcy in late 1992. The SVB takeover of USM was hastened to thwart an impending purchase of USM by another company with which Petitioners were then negotiating[1]. Petitioners were thereby deprived of large commissions which they would have received if the USM purchase had not been thwarted.

Petitioners filed this lawsuit in 1996. In early 1999, Petitioners settled with the bank defendants and dismissed them from the lawsuit. The accounting defendants then filed a summary judgment motion, contending that insufficient evidence existed to show that they had fabricated financial information on USM to assist McMillan in orchestrating its demise. Petitioners presented evidence in opposition, and the summary judgment motion was denied in November, 2000. Trial was then set for February 26, 2001.

On the first day of trial, the accounting defendants

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1. In addition to challenging unexplained intimations by SVB that USM was in default, USM launched the alternative plan of seeking acquisition by another company, and commissioned Petitioners to find a buyer. In December, 1991, Petitioners informed SVB officials that sale of USM would probably occur soon. In league with McMillan, the SVB officials falsely assured Petitioners that SVB would refrain from jeopardizing the sale by taking any action against USM, but instead expedited their efforts to take over USM. Petitioners relied on the assurance by focusing on sale of USM, rather than marshalling resources to resist SVB's takeover effort.

presented *in limine* motions seeking exclusion from trial of an array of evidence. Their Motion in Limine No. 15A ("Motion 15A") sought exclusion of any evidence concerning McMillan's fabrication of the false loan papers in 1990. Petitioners vigorously opposed Motion 15A, pointing out that evidence of these false papers was indispensible in proving McMillan's motive to enlist the accounting defendants into a conspiracy to orchestrate the demise of USM. Arguing that exclusion of this evidence would be fatal to their effort to prove at trial that there even existed a conspiracy for the accounting defendants to join, Petitioners stipulated to entry of judgment against them if Motion 15A were granted so that the issue could be appealed forthwith.

On the following day, the trial court conducted a hearing on the record in which Petitioners presented a detailed offer of proof on the circumstantial evidence that the conspiracy existed and that the accounting defendants had joined it. The trial court then granted Motion 15A, and issued judgment as stipulated (Appendix A).

Petitioners then appealed to the Court of Appeals, arguing *inter alia* that the granting of Motion 15A deprived them of their due process right to a fair trial. Petitioners pointed out that due process places a recognized constraint

on the usual process, in deciding *in limine* motions under California Evidence Code §352 ("§352"), of weighing the probative value of the evidence against its potential of prejudice, undue consumption of time, and jury confusion, and cited for this proposition the decisions in Kessler v. Gray, 77 Cal.App.3d 284 (1978) and Kelly v. New West Federal Savings, 49 Cal.App.4th 659 (1996). Petitioners argued that both decisions, but in particular Kelly, stand for the proposition that the due process guarantee of a fair trial constrains the discretion of a trial court to exclude, on the basis of §352 criteria, evidence "...which is directly relevant to the primary issues of the litigation," Kelly, supra, 49 Cal.App.4th at 674. The opinion of the Court of Appeals below ("opinion below") disregarded this due process constraint in upholding the trial court as having acted within its discretion in finding that risks of prejudice, time consumption, and jury confusion outweighed the probative value of the challenged evidence[2].

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2. It may be added that, as detailed in Petitioners' petition for rehearing - which went largely unheeded by the court below, the opinion below materially misconstrues and understates the probative value of the evidence set forth in Petitioners' offer of proof to the trial court. In their offer of proof, Petitioners set forth two categories of evidence in support of their opposition to Motion 15A. First was the "motive evidence" which Motion 15A sought to exclude. This evidence includes key documents, witness testimony (including Ruebusch and the state bank examiners), and the opinion of Petitioners' handwriting expert, which

support inferences that Robert McMillan, the SVB loan officer, acquired in mid-1991 the motive to conceal false loan papers which he had fabricated during 1990, and in particular to hide them from state bank examiners who found various irregularities in SVB lending practices during an on-site visit in mid-1991, and who consequently expressed the intent to continue closely to monitor SVB loan portfolios. Second was the "tying evidence" that showed close and irregular interactions between McMillan and the accounting defendants concerning USM which, Petitioners argued, supported the conclusion that the accounting defendants were part of McMillan's conspiracy, and hence buttressed the justification for admitting McMillan's "motive evidence"against the accounting defendants. In incompletely surveying the "tying evidence", the opinion below incorrectly referred to it as the "motive evidence", and then inaccurately characterized the "tying evidence" as devoid of any direct evidence of the falsity of documents prepared by the accounting defendants in furtherance of the conspiracy (their disengagement memoranda, the 1991 financial statements for USM, and the 1991 bad debt list for USM). In their successful opposition to the earlier summary judgment motion by the accounting defendants, in their offer of proof to the trial court, and in their briefing to the court below, Petitioners detailed direct evidence of the falsity of each of those documents. As to the disengagement memoranda, this direct evidence was twofold: (1) whereas the memoranda stated that the accounting defendants chose to withdraw from their engagement with USM, Ruebusch can testify instead that he fired them due to irregularities in their interaction with McMillan respecting USM; and (2) whereas the memoranda stated that the accounting defendants' reason for withdrawal was their lack of confidence in USM due to the disarray of its financial records and its noncompliance with loan covenants to SVB, contemporaneous reviews of USM records by other accountants revealed that the records were in good order and in compliance with the loan covenants, and that USM was generally in good financial health. As to the 1991 financial statements, the direct evidence was that USM revenue and asset levels were in fact substantially greater than portrayed in said statements. As to the 1991 bad debt list, the direct evidence was that the bad debts owed to USM were in fact substantially less than portrayed in said list. Furthermore, circumstantial evidence shows that the accounting defendants had the unique opportunity to fabricate the 1991 financial statements and bad debt list, in that the figures contained in both documents were derived from 1990 financial information on USM (when it was financially smaller and weaker), and the accounting defendants

Petitioners then petitioned the California Supreme Court for review, again arguing that they had been deprived of their due process right to a fair trial. The California Supreme Court denied review without opinion (Appendix C).

REASONS FOR GRANTING THE PETITION

A. Conflict with federal decisional law

In Crane v. Kentucky, 476 U.S. 683 (1986), this Court reversed the criminal conviction of a juvenile following *in limine* exclusion of evidence that his confession obtained after prolonged interrogation was, while legally voluntary, nonetheless not credible due to the extreme circumstances under which it was elicited. Acknowledging its "traditional reluctance to impose constitutional constraints on ordinary evidenciary rulings by state trial courts," and the "wide latitude [left by the Constitution to such courts] to exclude evidence that is 'repetitive..., only marginally relevant' or poses an undue risk of harassment, prejudice, [or] confusion of the issues,'" the Court held that the determinative point therein was that "the Constitution guarantees criminal defendants 'a

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had access to the 1990 information because they had then been engaged with USM.

meaningful opportunity to present a complete defense,'"id. at 689-690.

While the protections of procedural due process under the Fourteenth Amendment are most frequently invoked by the federal courts on behalf of criminal and other defendants, federal decisional law makes clear that the Fourteenth Amendment also provides a measure of procedural due process protection to plaintiffs in private civil litigation. Phillips Petroleum Company v. Shutts, 472 U.S. 797 (1985). This Court therein faced the issue of the extent of such protection to be accorded out-of-state unnamed class action plaintiffs. Acknowledging that the potential claim of such a plaintiff is a "chose in action" and hence a "constitutionally recognized property interest," id. at 807, and that "[t]he Fourteenth Amendment does protect 'persons,' not 'defendants,' this Court ruled that the Fourteenth Amendment minimally protects such plaintiffs both by requiring "that the named plaintiff at all times adequately represent the interests of the absent class members," id. at 812, and requiring that such plaintiffs be given reasonable notice of the class action and the opportunity to "opt-out" therefrom, id. at 812-814.

In so holding, Phillips Petroleum rejected the more stringent "opt-in" procedure through an analysis of interests

in which the Court contrasted the limited burdens faced by out-of-state unnamed class action plaintiffs (who, by doing nothing, can reap the benefits of the suit if successful, and who face neither litigation expense nor risk of adverse judgment) with the weightier burdens of out-of-state defendants who, if notified of litigation against them in a foreign forum, must go to the effort and expense of litigation in order to avoid issuance of a default judgment against them. Id, at 806-812.

From a due process standpoint, the interests of Petitioners herein can readily be analogized to those of the out-of-state defendants analyzed in Phillips Petroleum and of the criminal defendant considered in Crane. Petitioners have litigated long, hard, and at great expense in the effort to vindicate their claims for monetary redress. After surviving a hard-fought summary judgment motion by the accounting defendants, and thereby earning the seeming promise of trial on the "triable issues" acknowledged in the ruling on that motion, Petitioners went to considerable further expense and effort to ready their case for the trial which they had long sought, and in doing so shouldered the risk of a significant adverse judgment for defense costs if

they lost at trial[3]. Fundamental to procedural due process is "our 'deep rooted historic tradition that everyone should have his own day in court,'" Ortiz v. Fibreboard, 527 U.S. 815, 846 (1999). That fundamental element of due process should protect Petitioners from the arbitrary *in limine* excision of evidence essential to their claims on the basis of criteria appropriate only to the evaluation of more collateral evidence.

In stating that due process constrains such evidenciary rulings, the decision in Kelly v. New West Federal Savings, supra, stands on the solid ground of federal decisional law, including Crane, Phillips Petroleum, and Ortiz. In disregarding any such constraint, the decision below squarely conflicts with said federal decisions.

B. Policy considerations

Our country is at a point in its history when its viability is threatened by extensive institutional misfeasance by major business leaders and the accountants who serve them. Private plaintiffs such as Petitioners have a role to play, akin to private attorneys general, in exposing and rectifying such misfeasance. The instant case hence affords an apt context for this Court to send the pointed message

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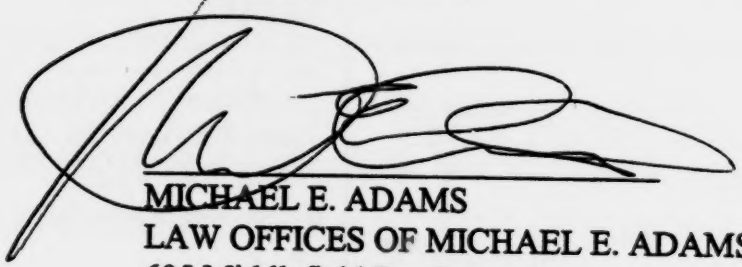
3. This risk has now materialized. The judgment below includes a cost award to the accounting defendants in excess of $15,000.00.

that private civil plaintiffs enjoy a measure of Fourteenth Amendment protection from the arbitrary obstruction by trial courts of their efforts to prove their entitlement to redress for past wrongs.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



MICHAEL E. ADAMS
LAW OFFICES OF MICHAEL E. ADAMS
605 Middlefield Road
Redwood City, CA 94063
Tel: 650/364-3346

Counsel for Petitioners

[Names and addresses of attorneys for plaintiffs and accounting defendants, and of defendant Won Gil Choe, are omitted]

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

MONEM KABIR and GREGORY P. RUEBUSCH, Plaintiffs, v. SILICON VALLEY BANK, et. al., Defendants.	No. CV 760042 **JUDGMENT AFTER TRIAL** Date: February 26, 2001 Time: 8:45 a.m. Hon. James H. Chang

WHEREAS, the above-captioned matter came on regularly for trial on February 26, 2002, before the Honorable James H. Chang, Superior Court Judge, presiding; and

WHEREAS, the following parties and counsel for the parties appeared for trial: Monem Kabir, Plaintiff; Gregory P. Ruebusch, Plaintiff; Michael E. Adams, attorney for Plaintiffs Kabir and Ruebusch; Robert Daney, Defendant; Michael Spence, Defendant, John M. Ottoboni and Robert C.

Danneskiold, attorneys for Defendants Backstrom & Neal, Robert Daney, and Michael Spence (hereinafter, collectively, the "Accountant Defendants"); and Won-Gil Choe ("Choe"), Defendant in pro per; and

WHEREAS, the parties met in chambers on February 26, 2002 before Judge Chang, and the Court heard argument on various motions in limine, including but not limited to argument on the Accountant Defendants' Motion in Limine No. 15; and

WHEREAS, the Court heard argument on February 27, 2001, on a portion of the Accountant Defendants' Motion in Limine No. 15, concerning the potential exclusion of evidence regarding alleged irregular loan activity involving Silicon Valley Bank ("Bank") and USM Technology Corp. ("USM"), *i.e.*, specifically, alleged irregular loan activity by the Bank involving a loan of $180,000 to USM and a $1 million line of credit to USM (hereinafter, said portion of the Accountant Defendants' Motion in Limine is referred to as "the Motion in Limine No. 15A"), which motion was joined in by Defendant Choe; and

WHEREAS, prior to hearing argument on the Motion in Limine No. 15A, the Court was advised, both informally in chambers and later in reported proceedings, that Plaintiffs and their counsel viewed that the impact of a potential ruling

adverse to them on such motion would be fatal to their ability to obtain a judgment after trial against the Accountant Defendants, and that, in the event of such adverse ruling, Plaintiffs would stipulate that judgment against them could be entered without waiver of rights of appeal in order to obtain appellate review of such adverse ruling with respect to Motion in Limine No. 15A; and

WHEREAS, it is the intent of the parties that, in the event the judgment on such adverse ruling on Motion in Limine No. 15A is reversed on appeal, the case would be tried as to Plaintiffs, the Accountant Defendants, and Defendant Choe; and

WHEREAS, the Court confirmed in reported proceedings, prior to hearing argument on the Motion in Limine No. 15A, the view of Plaintiffs and their counsel that a potential ruling adverse to them on such motion would be fatal to their ability to obtain a judgment after trial against the Accountant Defendants, and confirmed that the Accountant Defendants and Defendant Choe would have no objection, in the event of such adverse ruling and Plaintiffs' stipulation to judgment thereafter, to the entry of judgment by the Court on the basis of the foregoing; and

WHEREAS, the Court, thereafter, on February 27, 2001, heard extensive argument of counsel on the Motion in

Limine No. 15A, and, after due consideration of such argument made on behalf of the moving parties/Accountant Defendants and opposing parties/Plaintiffs, respectively, granted such motion as stated in reported proceedings.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED, based upon the foregoing recitals and based upon the reported proceedings of the trial of this matter on February 27, 2001, that judgment be, and hereby is, entered, in favor of Defendants Backstrom & Neal, Robert Daney, Michael Spence, and Won-Gil Choe, and against Plaintiffs Monem Kabir and Gregory P. Ruebusch, and that Plaintiffs take nothing by way of their Third Amended Complaint. Defendanats, and each of them, shall recover from Plaintiffs their costs of suit herein.

Judgment shall be entered accordingly.

DATED: February 28, 2001

/s/

Hon. James H. Chang
Judge of the Superior Court

[Approving signature by all parties omitted]

Court of Appeal, Sixth District, California.
Monem KABIR et al., Plaintiffs and Appellants,
v.
SILICON VALLEY BANK et al., Defendants and Respondents.

No. H022944.
(Santa Clara County Super.Ct.No. CV760042).
July 19, 2002.
As Modified on Denial of Rehearing Aug. 16, 2002.

WUNDERLICH, J.

This is an appeal from a stipulated judgment, which the trial court entered after granting a pretrial defense motion to exclude certain evidence that plaintiffs considered critical to their case. As we explain, we conclude that the trial court did not abuse its discretion in excluding the evidence in question. We therefore affirm the judgment.

FACTS AND PROCEDURAL HISTORY

We begin with a brief summary of the events giving rise to this action. [FN1]

FN1. We note at the outset that there was no fact-finding below, since this matter was resolved without trial. For that reason, the "facts" as stated in this opinion necessarily come from other sources. Some are drawn from this court's opinion in an earlier appeal in this case, in which we affirmed two orders granting preliminary injunctive relief to various defendants. (Kabir v. Silicon Valley Bank; Smith (Jun. 16, 1998, H016518) (nonpub.opn.).) Other facts are derived from the appellate record on this appeal, which includes the plaintiffs' verified complaint as well as the parties' offers of proof and their supporting documents related to the dispositive evidentiary motion. We further note that the events giving rise to this action apparently spawned at least one other lawsuit. (Kabir v. Silicon Valley Bank (Sep. 11, 1997, H014744) (nonpub.opn.).)

This action was brought by appellants Monem Kabir and Gregory Ruebusch (collectively, plaintiffs). Plaintiffs are former employees of USM Technology, Inc. (USM). Plaintiffs' complaint names various defendants, including Silicon Valley Bank (SVB) and certain of its individual officers and employees (collectively, the bank defendants); respondents Backstrom & Neal, Robert Daney, and Michael Spence (collectively, the accounting defendants); and respondent Won-Gil Choe (Choe). This dispute had its origins in a banking relationship between USM and SVB in the early 1990s. During part of that time, from May 1990 until July 1991, the accounting defendants provided accounting services to USM.

The essence of plaintiffs' claim is that the bank defendants--particularly Robert McMillan--conspired with the accounting defendants to create false financial statements concerning USM, in order to conceal McMillan's earlier creation of false loan documents. According to plaintiffs, as a result of that conspiracy: SVB falsely accused USM of defaulting on its loan obligations; SVB then sued USM in February 1992; SVB installed defendant Choe at USM to control its operations; and ultimately, USM went into receivership and then bankruptcy. As a consequence of those events, plaintiffs assert, they lost the opportunity to earn a sizable commission by arranging a sale of USM while it was a viable company.

Plaintiffs initially filed this action in August 1996. They filed their verified third amended complaint in May 1997.

In early 1999, plaintiffs settled with the bank defendants and dismissed them from the lawsuit. That left the action pending only against the accounting defendants and against Choe. The trial court later denied a defense motion for

summary judgment or, alternatively, for summary adjudication. Plaintiffs' case against the remaining defendants was set for trial thereafter.

In February 2001, at the time set for trial, the accounting defendants brought a motion in limine that addressed a number of evidentiary issues. As relevant here, defendants' motion sought the exclusion of any evidence of irregularities in two 1990 loans that SVB made to USM: a $180,000 term loan and a $1 million line of credit. Choe joined in the motion to exclude that evidence.

Plaintiffs vigorously opposed the motion. They also informed the trial court that an adverse ruling on the motion would be "fatal" to their case. For that reason, the parties stipulated to entry of a defense judgment in the event the trial court granted the motion.

After entertaining substantial argument, the trial court determined that the prejudicial effect of the evidence in question would outweigh its probative value. The court therefore granted the defendants' motion to exclude the evidence under Evidence Code section 352. [FN2]

> FN2. Evidence Code section 352 provides as follows: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. Further statutory references are to the Evidence Code unless otherwise specified.

Consistent with its evidentiary ruling and with the parties' stipulation, the trial court entered judgment for the accounting defendants and for defendant Choe in February 2001.

Plaintiffs filed this timely appeal from the judgment.

ISSUE

The sole issue on appeal is whether the trial court erred in excluding plaintiffs' proffered evidence of irregularities in the two bank loans involving their former employer.

APPEALABILITY

Before turning to the merits of the controversy, we first address the threshold question of whether the challenged judgment is appealable, "since the question of appealability goes to our jurisdiction.... [Citations.]" (Olson v. Cory (1983) 35 Cal.3d 390, 398, 197 Cal.Rptr. 843, 673 P.2d 720. Accord, Jennings v. Marralle (1994) 8 Cal.4th 121, 126, 32 Cal.Rptr.2d 275, 876 P.2d 1074.) We perceive two possible obstacles to appealability in this case: lack of finality and consent.

Finality. A judgment that fails to dispose of all claims between the litigants is not a final, appealable judgment under Code of Civil Procedure, section 904.1, subdivision (a). (Morehart v. County of Santa Barbara (1994) 7 Cal.4th 725, 743, 29 Cal.Rptr.2d 804, 872 P.2d 143.) In this case, the transcript of the hearing on the motion reflects some initial ambiguity about the effect of the court's ruling as to defendant Choe. But we are persuaded that any such ambiguity was resolved by the language of the judgment itself and by plaintiffs' appeal from that judgment. "By taking the position that the stipulated judgment was a final, appealable disposition of all of its claims, [appellant] unequivocally confirmed its consent to the dismissal of the unadjudicated claims with prejudice. Thus, the judgment, both on its face and in practical effect, constituted a final

disposition of all claims." (Tudor Ranches, Inc. v. State Comp. Ins. Fund (1998) 65 Cal.App.4th 1422, 1430, 77 Cal.Rptr.2d 574. See also, Sullivan v. Delta Air Lines, Inc. (1997) 15 Cal.4th 288, 309, 63 Cal.Rptr.2d 74, 935 P.2d 781.)

Consent. As a general proposition, a party may not appeal a consent judgment. (Norgart v. Upjohn Co. (1999) 21 Cal.4th 383, 399-400, 87 Cal.Rptr.2d 453, 981 P.2d 79.) But there is an exception for cases in which consent was given solely " 'to facilitate an appeal following adverse determination of a critical issue.' [Citation.]" (Id. at p. 400, 87 Cal.Rptr.2d 453, 981 P.2d 79. Accord, Tudor Ranches, Inc. v. State Comp. Ins. Fund, supra, 65 Cal.App.4th at pp. 1428-1430, 77 Cal.Rptr.2d 574.) This is such a case. Here, it is apparent from the stipulated judgment that the parties did not intend "to settle their dispute fully and finally" but "merely to hasten its transfer from the trial court to the appellate court." (Norgart v. Upjohn Co., supra, 21 Cal.4th at p. 401, 87 Cal.Rptr.2d 453, 981 P.2d 79.)

We are satisfied that the stipulated judgment before us is appealable.

STANDARD OF REVIEW

The parties dispute the applicable standard of review.

Plaintiffs apparently contend that de novo review is appropriate in this case. They allege that the erroneous exclusion of evidence denied them a fair hearing, which is reversible per se. (See, e.g., Kelly v. New West Federal Savings (1996) 49 Cal.App.4th 659, 677, 56 Cal.Rptr.2d 803 [error in excluding all evidence necessary to establish plaintiffs' case was reversible per se]. But see, id. at p. 675, 56 Cal.Rptr.2d 803 ["the trial court abused its discretion in granting the motion"]. Cf., Southern Pacific Transportation

Co. v. Santa Fe Pacific Pipelines, Inc. (1999) 74 Cal.App.4th 1232, 1246-1247, 88 Cal.Rptr.2d 777 [error in refusing to consider extrinsic evidence bearing on contract interpretation was reversible].)

Defendants disagree. They contend: "There can be no doubt that the 'abuse of discretion' standard of review is applicable to the instant appeal."

We agree with defendants that the challenged evidentiary ruling is properly reviewed for an abuse of discretion only. A substantial body of controlling and persuasive authority supports application of that deferential standard. "Broadly speaking, an appellate court applies the abuse of discretion standard to review to any ruling by a trial court on the admissibility of evidence. [Citations.]" (People v. Waidla (2000) 22 Cal.4th 690, 717, 94 Cal.Rptr.2d 396, 996 P.2d 46.) "Rulings under ... section 352 come within the trial court's discretion and will not be overturned absent an abuse of that discretion. [Citations.]" (People v. Minifie (1996) 13 Cal.4th 1055, 1070, 56 Cal.Rptr.2d 133, 920 P.2d 1337. Accord, People v. Rodriguez (1999) 20 Cal.4th 1, 9-10, 82 Cal.Rptr.2d 413, 971 P.2d 618.) "This standard of review applies to a trial court's determination of the relevance of evidence, as well as to whether the evidence's probative value is substantially outweighed by its prejudicial effect. [Citations.]" (People ex rel. Lockyer v. Sun Pacific Farming Co. (2000) 77 Cal.App.4th 619, 639-640, 92 Cal.Rptr.2d 115.) We therefore test the trial court's evidentiary ruling in this case for an abuse of discretion.

DISCUSSION

To properly assess plaintiffs' assertion that the trial court erred in excluding admissible evidence that was critical to their case, we start by examining plaintiffs' claims in this

action and the evidence they offered to prove those claims. We next consider defendants' motion to exclude the evidence and the trial court's decision to grant the motion. Finally, we assess the trial court's ruling against the applicable legal framework.

1. Plaintiffs' Claims

Plaintiffs' fundamental claim is that the defendants conspired to ruin USM, a conspiracy that cost plaintiffs the opportunity to earn a large commission for selling USM. The underpinnings of plaintiffs' theory of the case may be summarized as follows: Robert McMillan, one of the bank defendants, created two fraudulent "paper" loans in October 1990 for his own illegal purposes: a fictitious $180,000 term loan and an unauthorized $1 million line of credit, both of which featured SVB as the lender and USM as the purported borrower. The following year, in an attempt to conceal his fraudulent loan activity from bank auditors, McMillan began a campaign to destroy USM financially. McMillan enlisted the aid of the accounting defendants in this conspiracy to bring USM to ruin. The campaign to destroy USM was successful. In December 1991, SVB declared USM's default, based on false financial statements provided by the accounting defendants. In January 1992, SVB placed defendant Choe in USM in order to gain control of the company. In February 1992, SVB sued USM for failing to pay the fictitious $180,000 loan. In August 1992, USM went into receivership; the following month, it went into bankruptcy.

2. Plaintiffs' Proffered Evidence

By an informal offer of proof, plaintiffs described the evidence they expected to introduce and the inferences they hoped to draw from that evidence. The limited purpose of

that evidence was to show McMillan's motive to conceal the loan irregularities and to obtain the assistance of the accounting defendants in accomplishing that concealment.

In broad brush, plaintiffs' offer of proof consisted of the following principal elements:

(a) The Relationship Between the Bank and the Accountants

The accounting defendants had a close relationship with McMillan and his employer, SVB. That relationship included playing golf together and referring business to each other. McMillan had in fact referred USM to the accounting defendants. According to plaintiffs, McMillan and the accounting defendants also discussed "unusual things for a banker and accountant to be talking to each other about" in connection with a common client like USM. One such "unusual thing" included a representation to McMillan by Spence, one of the accounting defendants, that USM was slow in paying his firm's bills. That disclosure prompted McMillan to contact USM and "act[ ] like a bill collector" for the accounting defendants. Another such unusual topic of conversation was McMillan's alleged disclosure that he had created the fictitious line of credit. Plaintiffs infer that McMillan made that disclosure to the accounting defendants because Spence allegedly knew about the line of credit before USM had authorized that borrowing. Plaintiffs asserted that the foregoing evidence demonstrates "a closeness of the relationship and one that kind of crosses ordinary lines of propriety."

From the relationship between the bank and the accountants, plaintiffs urged, the jury could infer that the accounting defendants agreed to help protect McMillan by providing false financial information about USM, with the intent and effect of forcing the company into default.

(b) The Accountants' Disengagement

The professional relationship between USM and the accounting defendants ended in mid-July 1991. The accounting defendants later prepared disengagement memoranda in connection with the termination of their relationship with USM. According to plaintiffs, those memoranda--which portray USM as being in financial disarray--are pretextual.

Plaintiffs argued that the disengagement memoranda support the inference that the accounting defendants helped paint USM as financially troubled, thereby aiding the conspiracy to force the company into default, receivership, and bankruptcy.

(c) USM's 1991 Financial Statements

According to plaintiffs, SVB possessed internal documents consisting of falsified USM financial statements for 1991, which made USM appear to be in worse financial condition than it was, including month-end reports for April, June, July, October, and December of 1991. Plaintiffs argued that the accounting defendants provided the false information in those internal bank documents. As the court observed, however, plaintiffs did not offer any direct evidence that those financial statements were false. Furthermore, the court expressed concern with plaintiffs' attempts to tie the accounting defendants to the allegedly false statements, since it was undisputed that the accounting defendants did not work for USM after mid-July 1991.

Notwithstanding the court's concern about foundational evidence, plaintiffs argued that the jury could infer that the accounting defendants provided false financial information

for 1991, both because they had access to USM's financial data for 1990, which could be altered into false data for 1991, and because they had the requisite accounting expertise to manipulate and falsify the figures.

(d) USM's Bad Debt List

SVB also had a list of USM's bad debts in its possession. According to plaintiffs, that document actually listed USM's bad debts as of December 1990, but it was altered to show a date of December 1991. Because USM had more bad debts in 1990 than it did in 1991, the alteration made USM appear to be in worse financial shape than it was, thereby further contributing to the bank's efforts to force USM into receivership and involuntary bankruptcy.

Plaintiffs argued that the jury could reasonably infer that the accounting defendants gave the date-altered list to the bank, because they had access to the company's 1990 bad debt list.

Viewed as a whole, plaintiffs' offer of proof relied on inferences drawn from direct evidence, which may be fairly summarized as follows: (a) there was direct evidence of the relationship between the bank defendants and the accounting defendants; (b) there was direct evidence of the accounting defendants' disengagement memoranda but no evidence of the falsity of those memoranda; (c) there was direct evidence of USM's 1991 financial statements but no evidence of the falsity of those statements and no evidence tying the accounting defendants to those statements; and (d) there was direct evidence of USM's bad debt list but no evidence of its falsity and no evidence tying the accounting defendants to the list.

Plaintiffs sought to introduce the foregoing evidence, and

to draw the foregoing inferences, in order to prove their conspiracy claim against the accounting defendants. Plaintiffs argued that the evidence was relevant and critical to their case because it established motive on the part of McMillan, the accounting defendants' coconspirator. As plaintiffs argued below: "The motive of McMillan alone is the crux of the case against the accounting defendants."

3. The Defense Motion to Exclude

The accounting defendants sought to exclude any evidence of wrongdoing by the bank defendants. In their moving papers, they first asserted that the evidence was not probative, given the absence of any direct evidence that the accounting defendants had participated in the creation of any fraudulent bank documents or in any fabrication of USM's default. Next, they argued, any "marginal relevance" of the "alleged Bank defalcations" was "substantially outweighed" by its prejudicial effect on them and by the likelihood that it would confuse the issues or mislead the jury. Defendants further contended in their moving papers that admitting the proffered evidence would be unduly time-consuming. As they put it, "evidence of alleged Bank defalcations would result in a 'trial within a trial,' as it would involve days of testimony regarding the Bank's 2-year lending relationship with USM, whether or not, at any given moment, USM was in default, the circumstances surrounding the bankruptcy of USM, etc." At the hearing on the motion, defendants also argued that the inferences plaintiff sought to draw were unreasonable.

4. The Trial Court's Ruling

At the conclusion of a lengthy hearing on the motion, the trial court announced its ruling from the bench.

The court first analyzed the relevance of the proffered evidence. The court began by commenting in detail on the largely inferential nature of plaintiffs' offer of proof. The court nevertheless concluded that the proffered evidence was relevant because of its tendency to prove McMillan's motive.

The court then engaged in the weighing process anticipated by section 352. The court first characterized the proffered evidence as "tenuous." In doing so, the court referred briefly to a jury instruction that gives criminal defendants the benefit of reasonable inferences, but observed: "That's for the jury to decide." [FN3]

> FN3. In contending for de novo review, plaintiffs assert that the trial court erroneously "selected" the standard enunciated in that jury instruction as a "rule of law." We reject that assertion as unsupported by the record.

The court then weighed the "tenuous" proffered evidence against the defendants' assertion of prejudice, stating: "And when you consider all of the factors and the proposed evidence, there is a tendency under [section] 352 to mislead the jury and to, because of the involvement of the bad loans or the irregularity in same, to paint with a broad brush that same emotional wrongdoing that was committed by one to be transferred to the defendants."

Having concluded that the probative value of the proffered evidence was outweighed by its prejudicial effect, the trial court granted the defense motion to exclude the evidence under section 352.

5. The Legal Framework

"Under section 352, a trial court may in its discretion exclude material evidence if its probative value is

substantially outweighed by the probability that its admission will necessitate undue consumption of time, or create a substantial danger of undue prejudice, confusion of the issues, or misleading the jury. The weighing process under section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules. [Citations .]" (People v. Jennings (2000) 81 Cal.App.4th 1301, 1314, 97 Cal.Rptr.2d 727.) "Reasonable exercise of trial court discretion ... requires that the trial judge balance the probative value of the offered evidence against its potential of prejudice, undue consumption of time, and confusion. [Citation.] That balancing process requires consideration of the relationship between the evidence and the relevant inferences to be drawn from it, whether the evidence is relevant to the main or only a collateral issue, and the necessity of the evidence to the proponent's case as well as the reasons recited in section 352 for exclusion. [Citation.] The more substantial the probative value of the evidence, the greater the danger of the presence of one of the excluding factors that must be present to support an exercise of trial court discretion excluding the evidence." (Kessler v. Gray (1978) 77 Cal.App.3d 284, 291, 143 Cal.Rptr. 496.)

(a) Probative Value

The probative value of evidence depends on its relevance. Relevance is statutorily defined as "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (§ 210.) "The test of relevance is whether the evidence tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive. [Citations.]" (People v. Garceau (1993) 6 Cal.4th 140, 177, 24 Cal.Rptr.2d 664, 862 P.2d 664.) "The trial court retains broad discretion in determining the relevance of evidence. [Citation.]" (Ibid.)

Here, the trial court determined that the evidence of McMillan's intent was relevant for the reason that "motive is always relevant." But the court also found the proposed evidence "tenuous," presumably because of its heavy reliance on inference. Evidence may be legally relevant, but still have little persuasive value because of its conjectural or inferential nature. (See, e.g., In re Romeo C. (1995) 33 Cal.App.4th 1838, 1843-1844, 40 Cal.Rptr.2d 85.) It is within the trial court's discretion to make such an assessment. The statutory "balancing process requires consideration of the relationship between the evidence and the relevant inferences to be drawn from it...." (Kessler v. Gray, supra, 77 Cal.App.3d at p. 291, 143 Cal.Rptr. 496. See also, Hrnjak v. Graymar, Inc. (1971) 4 Cal.3d 725, 733, 94 Cal.Rptr. 623, 484 P.2d 599 [before admitting evidence of plaintiff's motive to malinger, trial court must be "satisfied" that the evidence "establishes a strong inference" of malingering].) The weaker the logical link between the proffered evidence and the desired inference, the lower the probative value of the evidence. (Cf., e.g., People v. Minifie, supra, 13 Cal.4th at p. 1070, 56 Cal.Rptr.2d 133, 920 P.2d 1337: "the weaker the logical link between [a third party's threats] and the defendant's actions, the more the court may be justified in excluding them.")

We acknowledge the critical role that inference plays in proving a conspiracy. "As a general rule, a conspiracy can only be established by circumstantial evidence ...." (People v. Steccone (1950) 36 Cal.2d 234, 237- 238, 223 P.2d 17.) Furthermore, in such cases, although certain facts "standing alone as bits of isolated evidence ... might be entitled to but little weight, their evidentiary value as a connecting link along with other incriminating factors must be recognized." (Id. at p. 240, 223 P.2d 17.) Nevertheless, "the proponent must offer evidence sufficient for the trier of fact to determine that the preliminary fact, the conspiracy, is more

likely than not to have existed." (People v. Herrera (2000) 83 Cal.App.4th 46, 61, 98 Cal.Rptr.2d 911[construing §§ 403, 1223].) "The court should exclude the proffered evidence only if the 'showing of preliminary facts is too weak to support a favorable determination by the jury. [Citations.] The decision whether the foundational evidence is sufficiently substantial is a matter within the court's discretion. [Citations.]" (People v. Lucas (1995) 12 Cal.4th 415, 466, 48 Cal.Rptr.2d 525, 907 P.2d 373 [construing s 403].)

In this case, the trial court properly exercised its discretion in determining that the proffered evidence--though relevant--was of limited probative value because of its conjectural and attenuated nature.

The trial court's next step was to balance the probative value of the evidence against the statutory factors supporting exclusion. Contrary to plaintiffs' assertion, the court acted properly in undertaking that balancing process. (Cf., Kelly v. New West Federal Savings, supra, 49 Cal.App.4th at p. 677, 56 Cal.Rptr.2d 803.) The process contemplates that the trial court will weigh the probative value of proffered evidence against its potential for prejudice, confusion, and the undue consumption of time.

(b) Prejudice

The statute authorizes the exclusion of relevant evidence "if its probative value is substantially outweighed by the probability that its admission will ... create substantial danger of undue prejudice ...." (§352.) The " ' "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.' " (People v. Karis (1988) 46 Cal.3d 612, 638, 250

Cal.Rptr. 659, 758 P.2d 1189. Accord, People v. Garceau, supra, 6 Cal.4th at p. 178, 24 Cal.Rptr.2d 664, 862 P.2d 664; People v. Miller (2000) 81 Cal.App.4th 1427, 1449, 97 Cal.Rptr.2d 684.) In other words, the statute does not extend to prejudice that "inevitably comes from highly probative evidence of wrongdoing." (O'Mary v. Mitsubishi Electronics America, Inc. (1997) 59 Cal.App.4th 563, 576, 69 Cal.Rptr.2d 389, original italics.) "Often the most highly probative evidence is also highly damning, and therefore 'prejudicial' in a superficial sense of the word." (Id. at p. 575, 69 Cal.Rptr.2d 389.) While such evidence might be "damaging," that does not necessarily make it "unduly prejudicial." (People v. Garceau, supra, 6 Cal.4th at p. 179, 24 Cal.Rptr.2d 664, 862 P.2d 664.)

In this case, the challenged evidence had the potential to evoke an emotional, prejudicial response in the jurors, because it tended to paint the accounting defendants as wrongdoers willing to falsify financial documents. (Cf., e.g., Ellenberger v. Karr (1982) 127 Cal.App.3d 423, 427, 179 Cal.Rptr. 583 [prejudicial effect of inviting speculation that plaintiff was a tax evader]; Hrnjak v. Graymar, Inc., supra, 4 Cal.3d at p. 733, 94 Cal.Rptr. 623, 484 P.2d 599 [prejudicial effect of casting plaintiff as a malingerer].) While it is true that the prejudice in this case arises from the very accusation that is at the heart of plaintiffs' claim, the evidence linking defendants to that accusation is very attenuated.

Given the potential for emotional bias against the defendants here, particularly when balanced against the weak evidence that they in fact engaged in any wrongdoing, we cannot say that the trial court abused its discretion in concluding that presentation of plaintiffs' evidence would be unduly prejudicial.

(c) Undue Consumption of Time; Confusion

A trial court may also exclude relevant evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of ... confusing the issues, or of misleading the jury." (§352. Cf., e.g., People v. Hart (1999) 20 Cal.4th 546, 606, 85 Cal.Rptr.2d 132, 976 P.2d 683 [trial court correctly concluded that evidence on a collateral matter "had only minimal probative value, and that such value was substantially outweighed by the probability that presentation of the evidence would require the undue consumption of time and would create a substantial risk of confusing the issues and misleading the jurors"].)

Here, defendants expressed concern about the undue consumption of time, urging that putting the proffered evidence before the jury "would involve days of testimony." Plaintiffs offered a slightly rosier opinion, saying: "The 1990 activity could be handled in a day to two days of testimony." The court did not specifically cite undue consumption of time as a factor in its decision, although it did express concern that the evidence might "mislead the jury." We observe that substantial time and effort was required just to explain plaintiffs' complicated conspiracy theory to the learned trial judge. The underlying accounting issues are complex, and the evidence of defendants' participation is both sparse and convoluted.

In our view, this record demonstrates a substantial likelihood that trial of these issues would unduly consume court time and confuse the jury. (Cf., DePalma v. Westland Software House (1990) 225 Cal.App.3d 1534, 1544- 1545, 276 Cal.Rptr. 214 [evidence of tax benefits speculative, time-consuming, and confusing].)

CONCLUSION

"A trial court's exercise of discretion in admitting or excluding evidence ... [citation] ... will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]" (People v. Rodriguez, supra, 20 Cal.4th at pp. 9-10, 82 Cal.Rptr.2d 413, 971 P.2d 618.) Plaintiffs have made no such showing in this case. The trial court acted well within its discretion in excluding the trial evidence proffered by plaintiffs, and its ruling on the motion must be upheld.

DISPOSITION

The judgment is affirmed.
Plaintiffs shall bear the costs of this appeal.

WE CONCUR: PREMO, Acting P.J., and ELIA, J.
2002 WL 1614343 (Cal.App. 6 Dist.) Not Officially Published, (Cal. Rules of Court, Rules 976, 977)

Court of Appeal, Sixth Appellate District - No. H022944
S109436

IN THE SUPREME COURT OF CALIFORNIA
En Banc

MONEM KABIR, et. al., Plaintiffs and Appellants,

v.

SILICON VALLEY BANK et. al., Defendants and Respondents.

Petition for review DENIED.

Supreme Court
FILED
Oct 16 2002
Frederick K. Ohirich Clerk

Deputy

GEORGE, C.J.

Chief Justice